No. 6490

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

SEATTLE TITLE TRUST COMPANY, as Guardian of the Estate of VERNON A. PETERSON, Incompetent,

Appellee.

Upon appeal from the United States District Court for the Western District of Washington, Northern Division

Brief of Appellee

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STATEMENT OF THE CASE.

Vernon A. Peterson (to whom we shall hereinafter refer as the plaintiff), an incompetent World War Veteran appearing by the Seattle Title Trust Company, his legal guardian, in an action upon his

War Risk insurance contract and after the trial of his cause before a jury, recovered a judgment wherein he was adjudged permanently and totally disabled and entitled to the proceeds of his policy since his discharge from the service. His recovery is challenged by the Government in this appeal upon two grounds: *First,* that the evidence submitting the cause to the jury was insufficient to permit a finding of permanent and total disability while the policy was in force; and *second,* if the evidence was insufficient, the trial court erred in admitting certain records and medical reports of the United States Veterans Bureau, to whose care, treatment and supervision the plaintiff had, on various occasions since his discharge, submitted himself.

PLAINTIFF'S EVIDENCE SUFFICIENT FOR SUBMISSION TO JURY.

A party litigant is entitled to a jury trial of every issue of fact. Under the sanction of our Constitution one may not be deprived of his right to a trial by jury. The principle controlling the right to a trial by jury and the corollary power of a Federal court to direct or instruct a verdict, can scarcely be better stated than in the language of the late Justice Gilbert, recently cited in the War Risk insurance

case of *United States vs. Burke* (opinion filed June 1, 1931):

> "Under the settled doctrine as applied by all the federal appellate courts, when the refusal to direct a verdict is brought under review on writ of error, the question thus presented is whether or not there was any evidence to sustain the verdict, and whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.
>
> "And on a motion for a directed verdict the court may not weigh the evidence, and if there is substantial evidence both for the plaintiff and the defendant, it is for the jury to determine what facts are established even if their verdict be against the decided preponderance of the evidence. *Travelers' Ins. Co. vs. Randolph*, 78 Fed. 754, 24 C. C. A. 305; *Mt. Adams & E. P. Inclined Ry. Co. vs. Lowery*, 74 Fed. 463, 20 C. C. A. 596; *Rochford vs. Pennsylvania Co.*, 174 Fed. 81, 98 C. C. A. 105; *United States Fidelity & Guaranty Co. vs. Blum*, (C. C. A.) 270 Fed. 946; *Smith-Booth-Usher Co. vs. Detroit Copper Mining Co.*, 220 Fed. 600, 136 C. C. A. 58. In the case last cited this court said:
>
> "'The right to a jury trial is guaranteed by the Constitution, and it is not to be denied, except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto.'"

United States Fidelity & Guaranty Co. vs. Blake, 285 Fed. 449, 452.

Again,

> "such an instruction would be proper only where, admitting the truth of the evidence for the plaintiff below, as a matter of law, said plaintiff could not have a verdict." *Marathon Lumber Co. vs. Dennis,* 296 Fed. 471, C. C. A. 5.

A total and permanent disability within the meaning of the War Risk insurance policy has been so frequently authoritatively defined by this and other Circuits that it is unnecessary to do more than restate the interpretation which our own Circuit has placed upon it.

> "The term 'total and permanent disability' obviously does not mean that there must be proof of absolute incapacity to do any work at all. It is enough if there is such impairment of capacity as to render it impossible for the disabled person to follow continuously any substantially gainful occupation." *United States vs. Sligh,* 31 Fed. (2d) 735.

Let us also bear in mind that every reasonable presumption is to be indulged in, in favor of the insured who is entitled to the most liberal construction of his policy.

U. S. vs. Cox, 24 Fed. (2nd) 944;

Starnes vs. U. S., 13 Fed. (2nd) 312;

Law vs. U. S., 290 Fed. 972;

Ford vs. U. S., 44 Fed. (2nd) 754;

Phillips vs. U. S., 44 Fed. (2nd) 689;

Quirk vs. U. S., 45 Fed. (2nd) 631;

U. S. vs. Sligh, 31 Fed. (2nd) 735;

U. S. vs. Eliasson, 20 Fed. (2nd) 821.

Furthermore, it is the recognized law of war risk insurance that the insured in an action upon the policy is entitled to the most favorable aspect which his evidence will bear. *Eliasson vs. U. S.,* 20 Fed. (2nd) 821; and *Godfrey vs. U. S.,* 47 Fed. (2nd) 126.

With these guiding principles in mind it now becomes necessary to inquire into the evidence to determine whether there was any substantial testimony which, if accepted or believed by the jury would establish, or tend to establish, either by direct proof or reasonable inference, that the plaintiff was permanently disabled on or before the lapsation of his insurance policy, so that he thereafter was unable to pursue continuously a substantially gainful occupation. If there was any such testimony, the case was clearly for the jury, notwithstanding any contrary or conflicting evidence which may have been introduced by the defendant.

> "It is not the province of the court to determine the weight or preponderance of the evidence. That is the function of the jury. The court could, if there was no substantial evidence to support a recovery, direct a verdict for the defendant, but if the proof of the material facts was such that reasonable minds might draw different conclusions, one of which would sustain the plaintiff's claim, then the court is not justified in taking the case from the jury." *Sprencel vs. U. S.*, C. C. A. 5th, 47 Fed. (2nd) 501 (a war risk insurance case).

TESTIMONY SUPPORTING VERDICT OF THE JURY.

The plaintiff, Vernon A. Peterson, did not himself testify, the evidence indicating that at the time of the trial he was committed as an incompetent to the United States Veterans Bureau Neuro-Psychiatric Hospital No. 94 at American Lake. It appeared from the testimony that the plaintiff was married to Ruth Peterson during the period of his military service in 1918. That plaintiff was discharged from the military service January 25, 1919. The plaintiff upon numerous examinations by physicians of the United States Veterans Bureau disclosed to the examiners that he had contracted and had been treated for the disease of syphilis during his military service (plaintiff's Exhibits 2 to 15 inclusive). Substantive evidence of such treatment

was furnished in the course of trial by means of plaintiff's Exhibit No. 7, which was not a statement volunteered by the plaintiff but was significantly the summary of a search and inquiry by bureau officials into the original hospital records of the Medical Department at Camp Lewis made by the military medical authorities during the period while plaintiff was stationed there on military duty.

> "Records from the Base Hospital, Camp Lewis, Washington, dated June 25, 1918, state that the patient was treated there for syphilis while in the military service at that station. The neurological and psychiatric findings in this case are those of general paralysis. Laboratory examinations made at this hospital on April 28, 1926, and at Porro Laboratory, Tacoma, Washington, on April 29, 1926, do not show the typical paretic serology; however, the laboratory reports from Cushman Hospital, dated September 9, 1925, show a paretic curve, an increase in cells and a four-plus Wasserman of the spinal fluid, together with a one-plus Wasserman of the blood. Records show that the patient has been given active anti-luetic treatment and it is the opinion of the staff that the present report on the spinal fluid and blood Wasserman indicated a modification of the spinal fluid and blood findings by reason of treatment. The negative spinal fluid is due to mercurial and arsenical therapy. The patient is incompetent, inadaptable socially and economically and in need of further anti-luetic treatment." (Plff's. Ex. 7.)

It is also to be observed that the records fur-

nished by the Office of the Adjutant General of the United States disclose that the soldier was found at Camp Lewis to be suffering from extra large and lymphatic glands in the groins and extra small left cervical glands.

Thus we have objective evidence, uncontradicted anywhere in the record, that the plaintiff during service was a victim of one of the most dreadful disease which ever afflicted the human race.

The first medical examination after the plaintiff was discharged from service is that made by Dr. D. A. Nicholson on August 20, 1925. Dr. Nicholson was qualified as a specialist whose practice is limited to nervous and mental diseases (R. pp. 34 to 39). The diagnosis which the doctor made on the occasion of this examination was cerebrospinal syphilis classified as general paralysis of the insane, a disease of the brain and spinal cord caused by a syphiletic infection. As a result of the infection one part of the brain became more involved than some other part. (R. 35.) The physical symptoms produced by this disease were enumerated by the doctor as a slurring of speech, irritability, a tendency to forget, a change in the reflexes, mental conditions, unsteadiness, exalted ideas, and also depressed and quiet mental dispositions, a weakening

of the mental faculties, loquaciousness, emotional instability—laughing and crying (R. 34-35-36). The doctor found him at that time unable to take up any work and suffering from a permanent and progressive disease which, having lodged in the spinal cord and having involved the brain, was incurable, and subject at best to but temporary remissions. (R. 37 and 38.)

The doctor explained that the disease constituted no disability whatsoever until it involved the brain or spinal cord, but that after it lodged in the brain or spinal cord a train of symptoms indicating mental deterioration was produced; that these symptoms were "incident to paresis in the later stages." (R. 36, 37, 38.) These periods of remission, he testified, occur in the case of general paralysis and sometimes the patients get better so that they may return to their occupations, but only temporarily, varying the length of time from a short period to as much as two or three years. Moreover, that on some of his subsequent examinations he found the plaintiff better than he was on the first examination, but such improvement was, in his judgment, but a mere temporary remission to be followed in each case by a recurrence. (R. 38.) Further he declared that, while many cases of syphilis did not involve the

brain or nervous system, frequently such involvement was found in a large number of cases from the time a person contracts the infection. (R. 38.)

Later during the course of the trial Dr. I. R. Quilliam, chief of the neurological section of the U. S. Veterans Bureau, was called as a witness for the defendant. He testified that syphilis in the third stage manifested itself by striking the nervous system and in certain cases by affecting the spinal cord, the covering of the brain or the brain itself and that when it does so it usually results in a form of insanity. (R. 65,66.)

He declared that the disease is a progressive one and that the time required to progress from the second to the third stage is indefinite and that in some cases the third follows the second very soon; and that some men who acquire this infection become invalids very soon. (R. 67.) He testified that where you find mental manifestations, and an impairment of the mental faculty, the disease has reached an involvement of the brain and spinal cord. He further testified that the involvement of the brain was subsequent to and more serious than the mere involvement of the spinal cord in that the former produced mental impairment while the latter resulted in nervous disorders, and that he on his examination had

found symptoms suggesting involvement of the brain as well as of the spinal cord. (R. 68, 69.) He, too, found the outlook for recovery, that is, the prognosis, to be guarded and unfavorable. (R. 70.) When he first examined him in 1925, one of the symptoms which he noted indicating an involvement of the brain was the slurring of speech resulting from an impairment of the nerves that control the muscles of the tongue, which he said was characteristic of cerebal-spinal syphilis. (R. 74.)

Likewise, in the long series of examinations of the plaintiff in the U. S. Veterans' Bureau, the reports of which examinations were put in evidence in plaintiff's Exhibits 2 to 15, an impairment of mental processes, defects of memory, slurring speech, loquaciousness, mild euphoria, explained as meaning ideas of exaltation and well-being, an increase in some reflexes and a decrease or absence of other reflexes, emotional instability, grandiose ideas, a halting and ataxic manner of speaking, a twitching of the facial muscles, together with constant, coarse, irregular tremor of the thumb and fingers, inco-ordination in the movement of muscles and the limbs, volitional and mental deterioration, social and economic inadaptability, irritability and a lack of insight into his condition as well as a lack of judgment—these

and many other characteristic symptoms were invariably noted in practically every examination. He was invariably pronounced incompetent, socially inadaptable, in need of a guardian, and, owing to the nature of the disease, recovery was said to be guarded, doubtful and unfavorable.

From the moment that the plaintiff found himself under the care and treatment of medical men, there is no question of the totality and the permanency of the disease or of his disability. There remains for consideration the period dating from his discharge from service, extending up to August 20, 1925, when he was first medically examined. For a true picture of his condition throughout this period we must rely upon the testimony of those who knew him and associated with him and were thus in a position to report the facts bearing upon the situation. The Government, of course, sets forth its view of the testimony. In a few brief lines the Government would summarize the testimony of Ruth Peterson, wife of the plaintiff, as well as the testimony of plaintiff's several other witnesses, and would make it appear that the plaintiff worked with regularity from the date of his discharge until 1925 and did so without any serious interference resulting from his disease and disability. Such a conclusion or such an inference in the judgment of the appellee

cannot properly be derived from the testimony of either Mrs. Peterson or any of the other witnesses for the plaintiff. It can only be adopted by distorting actual testimony, by placing undue emphasis upon certain statements and omitting entirely the context in which such statements appear. Let us turn to the actual testimony of the witnesses. Ruth Peterson testified she was the wife of Vernon A. Peterson, now a ward of the Seattle Title Trust Co.; that they were married November 15, 1918. That he was discharged January 25, 1919. After discharge witness and plaintiff went to California for his health and visiting for a short time with his mother. Plaintiff then went to Los Angeles to obtain work. Witness' testimony then continues:

> "He worked for a short time right after I got down there, loading cars * * * around a couple of weeks. During the time he was employed in Los Angeles he was very nervous. He would pace up and down the room. * * * After he had eaten his supper he would faint away—fall out of his chair. He would topple over that way. That condition would continue for several minutes. He would finally get out of it *and would be out of his head altogether.* * * * He was very pale. He had a glary look in his eyes. His eyes were inflamed. * * * He would go to this company loading cars for them. * * * He worked * * * a couple of weeks. He had fainting spells and he would come home in the evening after dinner. They would come in succession. * * * After he quit his job we returned

to Seattle. After he had fainting spells he was out of his head *and made strange, gurgling sounds.* When he first came out of it he was nauseated. He complained of being very sick after these spells. He had these fainting spells before he quit." (R. 16 and 17.)

Witness then testified that she and plaintiff returned to Seattle. Plaintiff started to look for work and went to work on the street car as conductor for the City of Seattle, this being around July, 1919. She then testified:

"He worked there about two months on the street car. He had broken shifts with no definite hours. The shifts varied—most of his shifts were at night. * * * He would work over a period of probably four hours. * * * He worked quite steady—as often as there was work for him on the extra list. * * * He was transferred from the street car to the Georgetown car barn, where he was head mechanic." Witness then testified that plaintiff worked

eight hours a day quite steadily about six months, ate meals regularly, spent evenings at home. This was in 1919 within a few weeks after his discharge. Witness Ruth Peterson then continued:

"He was very nervous and uneasy. He would pace back and forth—go to one chair and sit in it, then pace back and forth, then to another. He was extremely nervous. * * * I was never in the car barn while he was working there. He would pace around the room back

and forth. Back and forth again. On the go continually. He did not sit down."

Witness then continues:

"He had a peculiar expression from his eyes. It was glassy and very stary. The eyes would bulge. Outside of being extremely nervouse, pacing back and forth, back and forth, I have nothing definite in mind. *He stammered quite a bit.*"

Witness then testified that when plaintiff left the car barn he went into a garage. The garage was very small. He was there for two months. That he worked on only one car. That she actually saw him work on the car. "He was very awkward in picking up tools. * * *." (R. 15, 16, 17, 18, 19.)

Mrs. Peterson further testified that the only car that the plaintiff had for repair would not run when he finished repairing it. Ruth Peterson further testified that after the garage episode the plaintiff finally went to the Mission Theater. Witness testified that during this time:

"He was very nervous. He would start to do one thing, and then do something else. He would start to pick up something and couldn't find it. * * * I would go with him to the theater and then go with him to get the films. We would go to the film exchange with the films the night before and get advertising and films into the car and we would go back. We had everything written down for the night's per-

formance and I would watch to see that he got everything for the night's business."

Witness then testified that plaintiff worked as a sort of janitor, cleaning out the show-house. That plaintiff's partner managed and that she was with him constantly and saw that everything was done right. That she was with him as constantly as she could be but that she had four small children and could not always be with him. Further:

"His whole ambition was to make a living. He was attached to the children."

That when he was sent for pictures he would return with the wrong pictures, or might not bring pictures back at all and the show could not be started. Further:

> "In the evening if someone wasn't there to watch him he would leave the front and back doors (of the showhouse) wide open, and many times he left his night's receipts in the box office window. It was part of his duty to put the money away. *This conduct continued all the time he was in the show.*" (R. 19, 20.)

This erratic, and irresponsible conduct continued throughout the entire period plaintiff was in the show business, and the burden of managing the business fell largely to his partner and the witness, his wife.

The record then states that the witness and plaintiff left the Mission Theater and again went to California for his health and to visit his mother. She further testified:

> "He was nervous on the train and the muscles of his face would twitch in every direction and he had a stroke while he was in the theater afterwards, on the side." * * * "Sometimes it would strike his tongue and sometimes he could not talk. Sometimes it would strike his hand."

That this occurred very frequently and lasted for about a year. They were in California for a short time, and upon their return to Washington they again went into the show business in Tacoma. That immediately thereafter he disappeared with an automobile for a period of about two weeks without accounting for his absence. She ran the theater and took care of the four children. Further:

> "And when I would tell him he would have to help he would pout, and one night he come into the theater without any trousers on."

This was while witness was playing the piano and when she asked him why he did this, he said, she testified,

> "he said he didn't do anything. His mind seemed to be blank. There wasn't anything there. It (his having come into the show with-

> out any trousers) didn't seem to affect him. He didn't seem to know what happened, and then I finally made him go to bed. * * * I would ask him to put the car away and then he would go into the theater and peek around the curtain and see if I was watching him. * * * I talked to him and told him he could not go without his clothes and he said, 'I will go out there without any clothes on.'" (R. 21-22.)

This continued for a period of about three months. The witness and plaintiff then returned to Seattle. He tried to work. The witness testified:

> "Each time he would say he had a job, and he only lasted about an hour on a job. That continued until he was put in the hospital."

Further she testified, in the hospital:

> "He does only little things. He recognizes me and wants to show me everything like a little child. I have taken the children over there (to the hospital). He is glad to see the children, but he is more like a child than a father."

The witness further testified that on occasional furloughs from the hospital he would come home

> "at one time he was home for a period of eight months. He would fly in rages towards me and he came after me with a butcher knife and then another time he came after me with clenched fists, and if he wasn't pampered I could not stay with him and I humored him on every occasion." (R. 21, 22.)

It will be noted that the complete record of Ruth Peterson's testimony creates a preponderating picture of mental and physical disability, not even hinted at in the Government's summary of two or three lines. This but illustrates the wisdom of leaving disputed questions of fact to the jury, whose determinations will not be disturbed upon appeal. However little plaintiff's view of the testimony may have impressed the appellant, it was by the verdict accepted and credited by the jury, and having merged into the judgment, is not reviewable upon appeal.

Appellee respectfully invites the attention of the court to the testimony of the witness, Dan Mango. He resides in Georgetown, Seattle, knew the plaintiff since 1919, until he went to the hospital; had frequent opportunity to observe him during this period. In 1919 the witness prepared a suit of clothes for plaintiff. Later he made a contract with plaintiff for advertising on the theater curtain. He testifies that he repeatedly asked him to come in and try on his suit and when the plaintiff came in, he was all excited and after having prevailed upon plaintiff

> "a half dozen times, I got him in front of the store and got him in and while he was trying

> the coat on he was nervous and gritting his teeth, so I asked him if he was nervous or anything or if he wanted a glass of water and he said 'Oh, no.' That was in May, 1919."

After that witness saw him many times and testified:

> "He acted about the same. He was always nervous and excited. He stuttered quite a bit."

Witness further testified that he continuously insisted that the ad for which he had contracted be put on the theater curtain, but while plaintiff continuously promised to put it on the curtain he never did so, but whenever he saw him on the street and spoke to him he looked excited, and sometimes would answer him by saying "Hello." (R. 39, 40.)

Witness C. F. Graves, police officer, stationed at Georgetown Station, Seattle, knew Peterson since 1920, observed that he was a very nervous and excitable person; found the doors of the theater unlocked. (R. 42, 43.)

Witness L. H. Collins, another police officer from Georgetown Station, knew Peterson since 1921. In the course of his duties came in contact with Peterson. Plaintiff Peterson often came to the police station, made various reports.

> "I saw him personally come into the station and I would walk up to the window and ask

him what he wanted, and he would turn away and go away. It seemed he would report that somebody was watching him—imaginary, apparently."

When witness went into the show he saw plaintiff "and he would seem to be chasing around all over the house for no purpose."

That everybody noticed this. That plaintiff was nervous and fidgety, was not very neatly dressed. He looked as though he needed a shave and maybe a bath, as though he wasn't very clean. (R. 39, 40.)

Emil St. Micheal testified that he was step-father-in-law of plaintiff. He saw plaintiff consistently and they knew each other very well, were very friendly, that plaintiff would go right by him and wouldn't say anything at all and when witness spoke to plaintiff

"he would just look at me and turn his head"; that when he went to buy films for the theater he would forget what films to get; that plaintiff would come to witness and ask him to go in to get films that the film store would be closed and there would be no films to start the show. (R. 32, 33.)

Witness W. J. Carey testified that he was a sergeant of the police; in 1922, at the Georgetown Station. He knew the plaintiff. Plaintiff came in and made complaints at night. That he investigated

the complaints and found them without basis. "He acted as though he were hopped up. He acted like a hophead, like a man full of dope." That when he was running the show he would go about ill-clad, three or four days growth of beard on his face. That plaintiff would put out posters advertising a show. "There were posters out at times of shows that had not been run at all." Also, "He would have a show going on and the wrong posters there." (R. 29, 30.)

Witness W. J. Jones, another police officer, testified observing plaintiff Peterson from 1921. "He was very flighty." He did not speak consistently. He complained to witness to clear up his show house and, on investigation, there was nothing to clear up. "He was always excited in the theater. At times he was awfully excited and would speak to no one. Very flighty." Observed him in 1921, 1922 and 1923. In 1923 and 1924 "he commenced to be in very bad shape. Less bright, growth of beard on his face, clothes half off." (R. 31.)

The testimony of witness Jenny Powers is of the same tenor. (R. 26, 27 and 28.)

Attention of the court is invited to the cross-examination of the several witnesses, particularly of witness Ruth Peterson as well as the direct examination of witness Ruth Peterson as well as to de-

fendant's Exhibits 1 and 2. Throughout the period when the show business was being operated by plaintiff, his partner and his wife the Government would have the court believe plaintiff was actively engaged in managerial and executive capacities. The testimony of all the witnesses of the plaintiff negative this conclusion.

It is significant that the appellant on behalf of the Government in its appeal furnishes but sketchy, slight and fragmentary excerpts from the plaintiff's testimony. The larger portion of the testimony consists of the testimony offered by the defendant's witnesses during the trial below. Thus it becomes apparent, even from the Government's own brief—and it is clear and indisputable from a consideration of the entire bill of exceptions, including the affirmative matter set forth in the brief of the appellee—that there were two views of the facts submitted to the jury. One was the theory of the plaintiff, which stood out plainly in the testimony, picturing a man who contracted a disease in service while his insurance policy was in full force and effect; a man who immediately upon the date of his discharge from service manifested unmistakable and characteristic signs and symptoms of an infection which had already lodged in the spinal cord and the covering of

the brain. Its existence at this early stage was demonstrated by the nervousness, the weakness, the fainting spells, the stuttering which was later identified as scanning of speech, the lack of power to accomplish mental concentration, the defect of memory and of reasoning processes and the consequent absent-mindedness, his inability to stand the responsibility of conducting his employment or managing his business. It is unnecessary to prolong the citation of these significant symptoms. Suffice it to say that the plaintiff was unable to pursue continuously a gainful occupation throughout the period of 1919 to 1925. Each pursuit he abandoned in the face of his physical and mental disqualifications. Nor would it be fair to the plaintiff to say that he pursued the theater business from 1920 to 1925. It is to be noted from his wife's testimony and even from the cross-examination of the Government's witness, Mr. Martin, that Mr. Peterson took over a going business when he entered the theater in 1920. He had the aid of his wife, an accomplished musician, and the management of his partners, Mr. Woodhouse and Mr. Lily. Yet in spite of that fact we find some time later that the builder, Mr. Martin, who testified for the Government (R. 58, 59), was obliged to repossess the building and take the property away

from Mr. Peterson. The truth is that Mr. Peterson's venture into the theater business was a total failure and only a further confirmation of the exaltedness and grandeur so characteristic of his disease. It was anything but the pursuit of a gainful occupation.

It is obvious that the Government rely in its assignment of error upon the proposition that the existence of total and permanent disability is conclusively negatived as a matter of law by a showing on the part of the Government that the plaintiff pursued an employment over a certain period of years, irrespective of the fact that the plaintiff's testimony proves—and the jury must have believed—that the plaintiff's attempts at employment were unproductive, irregular, and accompanied throughout by the irrepressible appearance of mental disintegration and consequent impairment due to the invasion of the coverings of the brain by the infection from his disease.

The question of permanent and total disability is a question of fact, under cases hereinbefore and hereafter cited. That it is so is proven by the Government's contention that its testimony on defense disproved the testimony offered by the plaintiff. Such a clear conflict of testimony, so characteristic

of most law suits, is solely for the jury's consideration.

The Government's view, which in its testimony and its argument it propounded to the jury, was that the plaintiff suffered no disabilities and no nervous or mental disease until 1925, when their own doctor, the witness Quillam, examined him and attempted to say that he was then in an incipient stage of neuro-syphilis. The Government's view of the testimony was properly rejected by the jury. The jury chose to accept the plaintiff's version. Its finding is final on this disputed question.

It is the universal rule that where some fact is put in evidence by the plaintiff and where that fact is controverted by the defendant, plaintiff is entitled to have issue tried by a jury. It is only where the evidence is wholly undisputed or so conclusive as to admit of no contrary view; only where reasonable minds can draw but one inference from the testimony that the determination of questions of fact may be withdrawn from the jury. Every inference fairly or reasonably to be derived from the evidence must, upon a consideration of this legal question, be construed in the plaintiff's favor. The question of credibility of the witnesses or the weight of testimony is entirely for the jury. Whether the evi-

dence of the plaintiff be strong or weak, if he offers evidence to support an issue tendered it is for the jury and not the court to pass on it. No amount of contradictory evidence will warrant a court withdrawing a case from the jury. Thus it is that in reviewing the decisions of the trial court every reasonable intendment is indulged in favor if its judgment and in favor of the verdict submitted by the jury of the court below.

Matters of fact are settled by the verdict of the jury and its finding is conclusive upon the court of error and review. If there is *any evidence reasonably tending to support the verdict,* then that verdict can not be questioned on review. These principles are, of course, fundamental and have been recognized as sound in the recent war risk case of the *U. S. vs. Burke*, 50 Fed. 2nd 653. Among the authorities which recognize these principles as controlling law may be cited the following:

Encyc. Fed. Proced., Vol. IV, Sec. 1416;

Bewditch vs. Boston, 101 U. S. 16, 25 L. Ed. 980;

Keyes vs. Grant, 118 U. S. 25, 30 L. Ed. 54;

Phoenix Mutual vs. Doster, 106 U. S. 30, 25 L. Ed. 65;

Encyc. Fed. Proced., Sec. 1416;

Oscanya vs. Winchester Arms, 103 U. S. 261, 26 L. Ed. 539;

Slocum vs. New York Life, 228 U. S. 364, 57 L. Ed. 879;

Congress, etc., vs. Edgar, 99 U. S. 645; *Encyc. Fed. Proced.,* Sec. 1417;

Alaska Fish, etc., vs. McMillan, 266 Fed. 26;

Bldwin, etc., vs. Jardine, 261 Fed. 861;

Connecticut Mutual vs. Lathrop, 111 U. S. 612, 4 S. C. 533, 28 L. Ed. 536;

Phoenix Mutual vs. Doster, 106 U. S. 30, 1 S. C. 18, 27 L. Ed. 65;

N. Y. C. & H. R. vs. Froloff, 100 U. S. 24, 25 L. Ed. 531;

McGuire vs. Blaunt, 199 U. S. 142, 50 L. Ed. 125;

Central National Bank vs. Royal Ins., 103 U. S, 783, 26 L. Ed. 459;

Anderson vs. Smith, 226 U. S. 439, 57 L. Ed. 289;

Standard Life, etc., vs. Thornton, 100 Fed. 582;

Bank of U. S. vs. Cerneal, 2 Pet. 543; 7 L. Ed. 513;

Vaughan vs. Blanchard, (Pa. S. C. T.) 4 Dall. 124, 1 L. Ed. 769;

Dernberger vs. B. & O. Ry., 243 Fed. 21;

Encyc. Fed. Proced., Sec. 1417, p. 932;

Missouri K. N. T. Ry. vs. Hall, 87 Fed 170;

Mutual Life, etc., vs. Graves, 25 Fed. (2d) 705;

Engstrom vs. C. N. Ry., 291 Fed. 736 (reversed 299 Fed. 929);

New Jersey, etc., vs. Pollard, 22 Wall. 341, 22 L. Ed. 877;

Fidelity Casualty, etc., vs. Glenn, 3 Fed. (2) 913;

Brockett vs. New Jersey Steamboat, etc., 19 Fed. 156 (affirmed 121 U. S. 637), 30 L. Ed. 1049;

7 *S. C. T.* 1039;

Russell vs. Post, 138 U. S. 425, 34 L. Ed. 1009;

Mauloir vs. American Life Insurance, 101 U. S. 708, 25 L. Ed. 1077;

Encyc. Fed. Proced., Sec. 1417;

Delk vs. St. Louis, 220 U. S. 580, 55 L. Ed. 590;

Ewing vs. Burnett, 11 Pet. 41, 9 L. Ed. 624;

Strather vs. Lewis, 12 Pet. 410, 9 L. Ed. 1137;

Aetna Life vs. Ward, 140 U. S. 76, 11 S. 720, 35 L. Ed. 371;

B. & O. R. Co. vs. Proeger, 266 U. S. 521, 45 S. C. 169, 69 L. Ed. 419;

Penn. vs. Green, 140 U. S. 49, 35 L. Ed. 339;

Bank of Wash. vs. Triplett, 1 Pet. 25, 7 L. Ed. 37;

Bank of U. S. vs. Carneal, 2 Pet. 543, 7 L. Ed. 513;

Sudbury vs. Pennsylvania, etc., 263 Fed. 76;

Heh vs. Duncan, 13 Fed. (2) 794;

Suchardt vs. Allen, 1 Wall 539, 17 L. Ed. 642;

Rochford vs. Pennsylvania, 174 Fed. 81;

Roach vs. Hulings, 16 Pet. 319; 10 L. Ed. 979;

First National Bank vs. Jones, 21 Wall 325, 22 L. Ed. 522;

Barreda vs. Silsbed, 21 How. 146; 16 L. Ed. 86;

Nutt vs. Minor, 18 How. 286, 15 L. Ed. 378;

Hickman vs. Jones, 9 Wall. 197, 19 L. Ed. 551;

Hepburn vs. Dubois, 12 Pet. 345, 9 L. Ed. 1111;

Ventress vs. Smith, 10 Pet. 161, 9 L. Ed. 382;

Deery vs. Cray, 5 Wall. 785, 18 L. Ed. 653;

Loring vs. True, 104 U. S. 223, 26 L. Ed. 713;

Barreda vs. Silsbee, 21 How. 146, 16 L. Ed. 86;

Gregg vs. Moss, 14 Wall. 564, 20 L. Ed. 740;

Wiggin vs. Burkham, 10 Wall. 129, 19 L. Ed. 884;

Aikens vs. Wisconsin, 195 U. S. 194, 49 L. Ed. 154;

Rogers vs. S. B. Wheeler, 20 Wall. 385, 22 L. Ed. 385;

Steever vs. Rickman, 154 U. S. 678, 27 L. Ed. 1052;

Louisville, et. cet. vs. U. S., 238 U. S. 1, 59 L. Ed. 1177;

Mobile vs. Esclava, 16 Pet. 234, 10 L. Ed. 948;

Oratiot vs. U. S., 15 Pet. 336, 10 L. Ed. 759;

Humes vs. U. S., 170 U. S. 210; 42 L. Ed. 1011;

Prentice vs. Lohne, 8 How. 470, 12 L. Ed. 1160;

Lindsay vs. P. Q. Mullen, 176 U. S. 126; 44 L. Ed. 400;

Mills vs. Smith, 8 Wall. 27 ,19 L. Ed. 346;

Smythe vs. Fiske, 23 Wall. 374, 23 L. Ed. 47;

Standard Oil vs. Brown, 218 U. S. 78; 54 L. Ed. 939;

Lancaster vs. Collins, 115 U. S. 222; 29 L. Ed. 373;

Central P. Ry. of Calif., 162 U. S. 91;

Hepburn vs. Dubois (*supra*), 9 L. Ed. 1111;

Eastman Kodak vs. Souther Photo, 273 U. S. 359, 71 L. Ed. 684;

Wilkes vs. Dinsman, 7 How. 89, 12 L. Ed. 618;

G. N. Ry. vs. Donaldson, 246 U. S. 121, 62 L. Ed. 616;

Corrine Mill vs. Toponee, 152 U. S. 405; 38 L. Ed. 493;

Troxell vs. D. L. & W. R. Co., 227 U. S. 434, 57 L. Ed. 586;

C. & N. W. Ry. vs. Ohle, 117 U. S. 123, 29 L. Ed. 837.

Appellant in its brief (p. 17) uncharitably suggests that the rule of liberal construction applicable to war risk insurance cases under the decision of our Supreme Court in *White vs. U. S.,* 270 U. S. 175, 70 Law Ed. 530; *Glazow vs. U. S.,* 50 Fed. (2nd) 178, and *U. S. vs. Messerve,* 42 Fed. (2nd), should be denied the plaintiff in the instant case for the reason that his disability is caused by syphilis. It is sufficient to remark that this court is sitting to pass upon questions of law, and not as a tribunal to sit in moral judgment upon the parties litigant. Yet whatever might be the rule if the incompetent were himself the beneficiary of these funds, we are not in this case called upon to discuss that problem. The fact is that the law by which war risk insurance is provided (38 U. S. C. A. Sec. 511) furnished insurance to those employed in active service not alone for their own protection but in the language of the Act, "for themselves and their dependents." The incompetent will never dispose of or expend the proceeds of his insurance. They will be available for the use and protection of his wife and four children, innocent of any moral obloquy attributable to the father of the household through the nature of his disease, and they directly and indirectly are just as much entitled to the benefit of the rule of liberal construction as any other war risk litigant.

It is apparent that the appellant desires to exclude from the consideration of this court the lay testimony of friends and acquaintances who pictured his condition between the date of his discharge and 1925 when he was medically examined. Objective facts can be proven by lay testimony as well as by medical testimony, even though they bear upon medical issues. Certainly where a disease was shown to have existed during service and where immediately upon discharge and continuously thereafter it was demonstrated that the plaintiff suffered from abnormalities, defects and conditions rendering him unfitted and unable to meet the industrial competition of life, and to earn a livelihood for himself and his family, notwithstanding the burden placed upon him of caring for his wife and his four children and notwithstanding a persistent effort on his part to meet the problem and then finally where medical specialists a few years later, in 1925, identify the symptoms, the abnormalities, and disabling conditions of the plaintiff as diagnostic of the disease of general paralysis of the insane, there is then only one conclusion; that is, that the general paralysis of the insane, discovered by the medical examiners in 1925, existed just so long as the symptoms referable to it existed. These defects and abnormalities, it has

been pointed out, by the testimony were shown to have been continuous from the date of the soldier's return from service.

This question has been excellently disposed of in the 4th Circuit in the case of *Carter vs. U. S.,* 49 Fed. (2nd) 291, cited with approval by our circuit in the *Losson* case, 50 Fed. (2nd) *supra.* Justice Parker, speaking for the 4th Circuit, gives his opinion as follows:

> "The mere fact that a claimant may have worked for substantial periods during the time when he claimed to have been totally and permanently disabled is not conclusive against him. The question is not whether he worked but whether he was able to work * * * . The fact that a man does work is evidence to be considered by the jury as tending to negative the claim of disability, but the fact that he worked when physically unable to do so ought not to defeat his recovery if the jury found that such disability in fact existed."

Again the court says with specific reference to the effect of lay testimony as contrasted with medical evidence in the course of the same opinion:

> "In view of the arguments made before in this and other cases as to the weight to be given to the testimony of physicians we think it well to observe that whether a disability caused by disease be of a permanent character or not is to be determined, not exclusively from the diag-

> nosis made or the opinion given by physicians at the time of the onset of the disease, but by the history of the disease and all the other evidence in the case * * * If the evidence taken as a whole is of such character when viewed in the light most favorable to the plaintiff as reasonably to lead to the conclusion that he was totally and permanently disabled, the issue is for the jury to be decided by them in the light of all the evidence, including the testimony of the physicians.
>
> "For the reasons stated we think that the learned judge below erred in directing a verdict for the defendant."

Therefore it may be concluded that the absence of medical testimony prior to 1925 is unimportant in a case of this character where the disease producing the plaintiff's disability was shown to exist at the date of his discharge, and to have been medically progressive from that date forward and to have made itself manifest by a clear train of unmistakable symptoms from that date to this.

In principle, this case is not unlike the case of *Maleski vs. U. S.*, (43 Fed. 2, 974), in which a comparatively recent medical examination was recognized by the 7th Circuit as sufficient to identify a tubercular condition existing for many years prior to the examination and alleged to have existed ever since the soldier's discharge. Likewise in the case

of *Vance vs. U. S.,* (43 Fed. 2nd 975), the same circuit held lay evidence of a total and permanent disability was sufficient to make a *prima facie* case for the jury, where there was medical evidence based upon an examination shortly prior to the trial establishing a condition sufficient to account for the symptoms put in evidence by lay witnesses existing since the date of discharge.

In the recent case of the *U. S. vs. Riley,* 9th Circuit, the late Justice Rudkin in 43 Fed. 2nd, 203, upheld the sufficiency of lay testimony describing the symptoms of tuberculosis such as weakness, paleness, sickly color, fatigue, night sweats, from the period of the plaintiff's discharge until 1924 on which date he was examined by a physician and found to be suffering from tubercular activity. Such testimony, he held, is sufficient to carry the case to the jury, even though there was other testimony which would warrant a different side.

The Government's position that the plaintiff, because he worked was not as a matter of law totally and permanently disabled, cannot be accepted as the law of War Risk Insurance. The issue is as to the physical and mental condition of the plaintiff. Those who work when they are unfit to do so or who work until they drop dead from exhaustion, or who work

out of a sense of responsibility for relatives or dependents are not barred from recovery upon their insurance policy, if during the period of such employment it be shown that the insured suffers from a disease, wound or disability rendering it impossible for him to pursue continuously a substantially gainful occupation without material injury to his life or health.

See

U. S. vs. Messerve, 44 Fed. 2nd 549;
U. S. vs. Stamey, 48 Fed. 2nd 150;
U. S. vs. Losson, 50 Fed. 2nd 656;
U. S. vs. Burke, 50 Fed. 2nd 657.

The court and jury having seen the witnesses, having tested their credibility, and having determined all conflicting and disputed questions of fact in the plaintiff's favor, such determination is, under the rule of the cases heretofore quoted, conclusive. See also the following cases:

Eastman Kodak Co. vs. Souther Photo Materials Co., 273 U. S. 359, 71 L. Ed. 684;

Shadoan vs. Cincinnati N. O. & T. P. Ry. Co., 220 Fed. 68;

Rochford vs. Pennsylvania Co., 174 Fed. 81;

Lehigh Valley R. Co. vs. State of Russia, 21 Fed. (2nd) 406;

Mutual Investment Co. vs. Shull, 28 Fed. 830;

New York Tel. Co. vs. Beckers, 30 Fed. (2d) 578;

National Fire Insurance Co. vs. Renier, 22 Fed. (2d) 671;

National Biscuit Co. vs. Litzky, 22 Fed. (2d) 939;

Clark vs. McNeill, 25 Fed. (2d) 247;

Hayden vs. U. S., C. C. A., Wn., 1930; 41 Fed. (2d) 614;

Mullivrana vs. U. S., C. C. A., Wash., 1930; 41 Fed. (2d) 734;

LaMarche vs. U. S., C. C. A., Wash., 1928; 20 Fed. (2d) 821;

Whiteside vs. U. S., C. C. A., Ore., 1929; 35 Fed. (2d) 452;

Starnes vs. U. S., D. C., Tex.; 13 Fed. (2d) 212;

McGovern vs. U. S., D. C., Mont.; 294 Fed. 108, (affirmed C. C. A., 1924); 299 Fed. 302, writ of error dismissed 1925, 45 S. C. 351, 267 U. S. 608, 69 L. Ed. 812;

Malaveski vs. U. S., 43 Fed. (2d) 974;

Vance vs. U. S., 43 Fed. (2d) 975;

Ford vs. U. S., 44 Fed. (2d) 754;

Vance, 8 Circ., 48 Fed. (2d) 472;

Stamey, 9th Circ., 48 Fed. (2d) 150;

Sprencel, C. C. A. 5th, 47 Fed. (2d) 501;

Ranes, 9th Circ., 47 Fed. (2d) 582;

Crowell, 48 Fed. (2d) 475.

Reports of Government Physicians Admissible as Official Records.

The appellant's second ground of attack upon the plaintiff's recovery in the court below is predicated upon the claim that the exhibits offered by the plaintiff, consisting of reports of the examination of the plaintiff by physicians on the staff of the U. S. Veterans Bureau, were improperly admitted by the trial court. In its brief, the Government bases its objections on the grounds:

(1) No showing that the doctors were authorized to make the examinations.

(2) That the doctors were not shown to be unavailable.

(3) That the reports are hearsay, containing not what the doctor found, but only what he said he found.

(4) That the reports contain self-serving statements made by the claimant or the insured.

(5) That they deprive the government of the right of cross-examination.

Bill of Exceptions Shows Exhibits Received Without Objection.

A discussion of this question is not properly before the circuit court in this appeal, for the reason that the bill of exceptions contains no record of any objection on the part of the Government to

the receiving of these exhibits in testimony. (R. 34.) Mr. W. A. Schlax, a bureau official, in charge of the records of the plaintiff, was recalled as a witness for the plaintiff, and after producing from the plaintiff's folder the records called for by the plaintiff, testified that these records (Ex. 2 to 15 inc.) were taken from the official records of the U. S. Veterans Bureau, and were or were supposed to be examination reports made of the plaintiff by the bureau doctors. The record and the bill of exceptions then discloses that plaintiff's Exhibits 2 to 15 were received and read in evidence, with no record of any objections whatsoever by the Government.

The record for the review of the circuit court consists entirely of the bill of exceptions. The errors assigned upon appeal as error of law, must be shown to have been objected to, in the course of the trial below, and exceptions allowed thereto must be preserved in the bill of exceptions, otherwise the assignments of error fail, for lack of support by the record. A bill of exceptions must show the motion directed against the admission of evidence, and the ground on which the motion was based.

> *O'Brien's Manual of Federal Appellate Procedure,* p. 33, and note 10, citing 9th circuit cases. See also page 34, and note 14.

> "Every bill of exceptions should point out distinctly the errors of which complaint is made. It ought also to show the grounds relied upon to sustain the objection presented, so that it may appear that the court below was informed as to the point to be decided." *Zoline's Fed. Appellate Jurisdiction and Procedure* (2d Edition), Sec. 678, p. 377.

Review in the circuit court is not an inquiry *de novo* into the issues tried out in the court below, but is restricted to such questions and issues as mere made and considered and decided below. The trial court cannot be guilty of error in a ruling it has never made, or upon an issue to which its attention has never been directed. And more particularly, questions as to the admission and rejection of evidence at law, will be reviewed only when there was an objection and exception, and a *bill of exceptions* to bring it into the record.

> *Cyc. Fed. Procedure,* Vol. VI, p. 580 to 585, inc., Sec. 2973. Also see Sec. 2979.

As to the admission or rejection of evidence, and the necessity for rulings and the ground therefor, to appear in the record, see Sec. 2980, same volume.

Therefore, in the absence of any recorded objection, it is submitted that no complaint against the trial court's admission of these exhibits may now be urged upon appeal.

ADMISSIBILITY OF REPORTS OF BUREAU PHYSICIANS.

We shall discuss the issue of law raised in the appellant's brief upon its merits without in any wise waiving our objection that the exhibits in this particular case were according to the Bill of Exceptions and the Record admitted without objections on the part of the Government. The grounds of objection urged in appellant's brief are after-thoughts of which the appellant failed to give the trial court the advantage.

Rule 4 of the Supreme Court provides:

> "The party excepting shall be required to state distinctly the several matters of law in such charge to which he accepts; and these matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."

The same principle guides the appellate court in considering objections based upon admission or exclusion of testimony. Mr. O'Brien in his valuable *Treatise on Federal Procedure* states the rule with apt language in Section 687, page 381, of his manual:

> "A party must make every reasonable effort to secure from the trial court correct rulings, or such, at least, as are satisfactory to him

> before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions."

The ruling of the trial court, the objection of the party claiming prejudice and the ground thereof must clearly appear in the Bill of Exceptions.

> *Cyc. Fed. Pro.*, Vol. VI, Sec. 2980, and notes thereunder.

It is unnecessary to multiply citations upon this subject for it is elementary in appellate procedure that a party may not claim error for the first time upon review in the appellate court.

Again, however, without waiving our objection to the inadequacy of the record, so as properly to raise the question urged by the appellant, we desire to proceed to a consideration of the propriety of admitting such exhibits in order that the argument of the appellant may not pass unchallenged.

These records were admissible in our judgment under the principles laid down by Wigmore in his *Treatise on Evidence* under the designation of Official Documents or Official Statements. He classifies this exception to the hearsay rule under what he terms "The Principle of Necessity." He declares that while in most exceptions to the hearsay rule

it is necessary to show unavailability, death, absence, insanity or the like, under this particular exception the rigorous application of the principle of necessity is relaxed. Something less than an absolute impossibility is sufficient; the necessity, he states, reduces itself to expediency. It is expedient, he declares, if not practically necessary to accept official statements instead of summoning the official to attend and testify, *viva voce*. In the absence of such an exception Professor Wigmore reasons, "hosts of public officials would be compelled to devote the greater part of their time attending court as witnesses, and the public administration of government would suffer as a consequence." Such statements have, he points out, a strong circumstatial guarantee of trustworthiness, which takes the place of cross-examination.

Another sanction replacing the right of cross-examination which attaches to evidence of this nature laid down by Professor Wigmore is the presumption that public officers do their duty.

There is an official duty to make accurate statements or entries and this will usually invite the officer to its fulfillment. The officer may not be one required to take an express oath of office. It is merely the influence of official duty which pro-

vides the guarantee of trustworthiness justifying the acceptance of such hearsay statements.

Professor Wigmore declares further that no express statute or regulation is needed to create a statutory duty.

Moreover, Wigmore maintains that even where the declarant has a special interest or motive in the making of a representation it seems undesirable to exclude official statements, and he states that the usual judicial attitude favors their admission.

On recognized legal principles, therefore, these documents should be admissible. It is particularly true of the reports of Veteran Bureau physicians. Veterans were by Congress invited to submit to the Veterans Bureau for examination, diagnosis and necessary treatment. They were not to deal with the Government at arm's length. The bureau did not exist to accumulate secret reports against veterans, but rather "to provide a system of relief to persons injured, diseased or disabled in service" (W. W. V. A. Sec. 212, 38 U. S. C. A. 422) and to "insure those in service and to protect them and their dependents." (*In re Stormums Est.,* 1926, 218 N. Y. S. 396). The veteran was encouraged to trust himself to the bureau entirely for treatment

and relief, and the bureau officials, including, of course, their medical staff, were charged with a statutory duty to aid the veterans in securing treatment and any compensation to which they were entitled, or to the benefits of their insurance (W. W. V. A., Sec. ...., 38 U. S. C. A. 432).

Since therefore, these officials were under a duty, both statutory, moral, and imposed by bureau regulations, to record the history, the findings, the diagnosis and prognosis, the sanction of trustworthiness, in lieu of cross-examination, is provided, and under the rules of evidence, the reports themselves can take the place of the public official, in a trial where the subject matter of the report is a material issue. To the same effect see *Jones,* Sec. 1700.

But the appellants urge that the exhibit as a whole is inadmissible because it contains some declarations by the insured in his own interest, and hence improper. The true rule here would be that if such declarations are a necessary part of the record deemed essential to the proper administration of the Veterans Bureau, and the proper adjudication of claims arising under the act, then they become admissible under the foregoing rules.

It is also an answer to point out that if the physicians were personally present, testifying to the results of their own personal examination of the insured at a time *ante litam motam*—for the purpose of determining the necessary measures of hospitalization or treatment, they might under the recognized rules of evidence put in evidence the history given them by the patient with respect to the origin of his disease, and suffering or disability connected with its progress and development.

Wigmore, Sec. 1719 and 1722;
Jones, Sec. 1217.

> "The physician may base his opinion on statements given him by the patient in relation to his condition, past and present. Thus only can the expert ascertain the condition of the party. Where called to give relief from pain and for medical treatment, a statement of pain and suffering, past and present, if necessary to the diagnosis may be testified to by him."

The rule stated by *Greenleaf on Evidence*, and approved by the Supreme Court in *Northern Pac. vs. Urlin*, 158 U. S. 271, is to the same effect:

> "So also the representations by a sick person of the nature of the symptoms and effects of the malady under which he is suffering at the time are original evidence."

This same rule has received a very clear and explicit approval by our own circuit court in the case of the *Union Pacific vs. Novak,* 61 Fed. 573. See also *Abbot's Trial Briefs,* 2d Ed., p. 409, for a statement of the same rule.

It is also worthy of notice, that in every instance, the declarations of the insured to his physicians were borne out and confirmed by the pathological tests and personal medical observation of Veterans' Bureau physicians, who testified in person at the trial, so that it would be futile for the Government to claim prejudice from such records.

Whatever the rule may be under other circumstances, however, it is submitted that the admissibility of these reports has been definitely and finally approved in this circuit in the case of *U. S. vs. Stamey,* 48 Fed. (2d) 150, and in the case referred to therein of *U. S. vs. Cole,* 45 Fed. (2d) 339. In this latter case, the court added.

> "The objection was a general one, and we are not called upon to consider whether the whole record was admissible, or whether the court should only have received such parts as contain material specific findings of fact."

In our case, we find the bill of exceptions silent as to any objection, and further find that the only

objection made at all at the trial, which was not incorporated in the bill of exceptions, was the general objection that they are hearsay, in that they deprive the defendant of cross-examination. This argument was adequately answered in the *Stamey* and *Cole* cases, *supra,* as well as in the case of *McGovern vs. United States,* 294 Fed. 108, affirmed 299 Fed. 302. In other circuits see the following cases, approving the admissibility of these reports:

U. S. vs. Worley, 42 Fed. (2d) 197;
U. S. vs. Sprencel, 47 Fed. (2d) 501;
Nichols vs. U. S., 48 Fed. (2d) 203;
U. S. vs. Westcoat, 49 Fed. (2d) 193.

In conclusion, it is respectfully submitted that the evidence was such as to warrant submission to the jury; the medical reports were properly received into evidence by the trial court, and the judgment of that court should be affirmed.

Respectfully,

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